TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 76

THE FEDERAL LAND BANK OF SAINT PAUL,
PETITIONER

vs.

BISMARCK LUMBER COMPANY AND JOHN GRAY, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

PETITION FOR CERTIORARI FILED MAY 9, 1941
CERTIORARI GRANTED MAY 26, 1941

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. —

THE FEDERAL LAND BANK OF SAINT PAUL, PETITIONER

vs.

BISMARCK LUMBER COMPANY AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

INDEX

	Original	Print
Record from District Court of Burleigh County	1	1
Summons	1	1
Complaint	2	2
Admissions of service	11a	10
Demurrer of defendant, Bismarck Lumber Co	12	11
Demurrer of defendant, Owen T. Owen	13	11
Order sustaining demurrers	14	12
Order for judgment	15	12
Judgment	17	13
Notice of appeal	19	14
Specifications of error	20	15
Stipulation waiving undertaking for costs on appeal	24	18
Clerk's certificate [omitted in printing]	25	19
Proceedings in Supreme Court of North Dakota	26	19
Minute entry of argument and submission	26	19
Minute entry of reargument and submission	27	20
Judgment	28	20
Opinion, Nuessle, J.	29	21
Dissenting opinion, Christianson, J.	53	39
Clerk's certificate [omitted in printing]	64	46
Order allowing certiorari		**47**

1 In District Court, Fourth Judicial District, County of Burleigh

THE FEDERAL LAND BANK OF SAINT PAUL, A BODY CORPORATE, PLAINTIFF

vs.

BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA, DEFENDANTS

Summons

The State of North Dakota to the above named Defendants:

You are hereby summoned to answer the Complaint in the above entitled action, which will be filed in the office of the Clerk of the District Court in and for the County of Burleigh, State of North Dakota, a copy of which is hereto annexed and herewith served upon you and to serve a copy of your answer upon the subscriber within thirty days after the service of this Summons upon you, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Dated this 9th day of March A. D. 1938, at Bismarck, North Dakota.

GEO. F. SHAFER,
Attorney for the Plaintiff,
Office and Post Office Address,
Bismarck, North Dakota.

JOHN THORPE,
Attorney for the Plaintiff,
Office and Post Office Address,
346 Jackson Street, St. Paul, Minnesota.

ROBERT J. BARRY,
Of Counsel,
Office and Post Office Address,
346 Jackson Street, St. Paul, Minnesota.

2 In District Court, Fourth Judicial District, County of Burleigh

THE FEDERAL LAND BANK OF SAINT PAUL, A BODY CORPORATE, PLAINTIFF

vs.

BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA, DEFENDANTS

Complaint

Comes now the Plaintiff herein, and for its cause of action against the Defendants, alleges and shows to the Court:

I

That the Plaintiff is a body corporate, duly organized, chartered, and existing under the Act of Congress approved July 17, 1916, and acts amendatory thereof, known and cited as the "Federal Farm Loan Act." That said Bank is thereunder duly authorized and empowered to do business in the States of North Dakota, Minnesota, Wisconsin, and Michigan, the same constituting and comprising the Seventh Farm Credit District, and is further authorized and empowered, when designated for that purpose by the Secretary of the Treasury, to act as depositary of public moneys and as fiscal agent of the Federal Government. That its office and principal place of business is in the City of St. Paul and State of Minnesota.

II

That pursuant to the terms of said Federal Farm Loan Act, as amended, which created a system of banks and corporations to carry out a policy of the Federal Government announced therein, said bank is engaged in the extension of credit to farmers to be availed of in the furtherance of agricultural undertakings, such loans being made on the security of qualified first mortgages on farm lands situated in the States of its said district; receiving and collecting payments thereon; handling and disposing
3 of securities and properties acquired by it in carrying on its said operations; and generally in performing such services and functions as are necessary and incident to the conduct of its said business.

III

That in the conduct of its business in the State of North Dakota, The Federal Land Bank of Saint Paul has acquired and now owns a number of farm properties located in North Dakota, including three certain farm properties, together with the buildings located thereon, situated in Burleigh County, North Dakota, known as the Henry Apland farm, Henry V. Johnson farm, and Albert Kupkufski farm, respectively; that in connection with the ownership, maintenance, and preservation of said farm properties, it has been, and will be in the future, necessary for The Federal Land Bank to purchase at retail, from time to time, from retail dealers within North Dakota, large quantities of goods, wares, and merchandise for its use in repairing, maintaining, and improving the buildings and fences located on said farm properties.

IV

That the Defendant, Bismarck Lumber Company, is a corporation, duly organized and existing under the corporation laws of the State of North Dakota, with its place of business located at Bismarck, North Dakota; that the said Bismarck Lumber Company was, during all of the times herein alleged, duly authorized to engage in and transact business as a retailer under the provisions of Chapter 249, Session Laws of North Dakota, for 1937, and was engaged in the business of selling building materials at retail at its place of business located at Bismarck, North Dakota.

V

That the Defendant, Owen T. Owen, is now and has been since the month of January 1937, the duly appointed, qualified, and acting Tax Commissioner of the State of North Dakota; that the said Defendant Owen T. Owen, as Tax Commissioner of the State of North Dakota, was during all of the times herein alleged,
4 and is now, charged with the administration of Chapter 249 Session Laws of North Dakota for 1937, known as the State Sales Tax Act, and with the collection of all taxes due the State of North Dakota thereunder.

VI

That pursuant to the provisions of Chapter 249, Session Laws of North Dakota for 1937, entitled:

"An Act to Equalize Taxation and Replace in Part the Tax

on Property; To Provide the Public Revenue to be Used for Such Replacement by Imposing a Tax on the Gross Receipts from Retail Sales as Defined herein; To Provide for the Collection of Such Tax, the Distribution and Use of the Revenue Derived Therefrom, and the Administration of Said Law; To Provide for Certain Deductions and Exemptions; Establishing a Lien for the Payment for such Tax; To Fix Fines and Penalties for the Violation of the Provisions of this Act; To Repeal All Laws or Parts of Laws in Conflict herewith and Declaring an Emergency."

it is the duty of the said State Tax Commissioner to require every retail dealer subject to the provisions of said Act, to pay a tax of two per cent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in the Act, sold at retail in the State of North Dakota to consumers or users, and to require every retailer subject to the Act, to file a quarterly return in such form and manner as may be prescribed by the State Tax Commissioner, showing the gross receipts of the retailer, the amount of the tax for the period covered by such return, and such further information as the State Tax Commissioner may require.

VII

That heretofore and during the months of October and November 1937, the Plaintiff purchased at retail from the Defendant, Bismarck Lumber Company, and the said Defendant sold and delivered to the Plaintiff at Bismarck, North Dakota, certain goods, wares, and merchandise as follows, to wit:

(1) That on October 28, 1937, the Plaintiff purchased and received from the Defendant, Bismarck Lumber Company, and the said Bismarck Lumber Company sold and delivered to the Plaintiff at Bismarck, North Dakota, for use in repairing, maintaining, and improving the buildings located on one of its farm properties situated in Burleigh County, North Dakota, known as the Henry Apland farm, certain building materials, consisting of lumber, cement, glass, plaster, nails, and other like articles of merchandise; that the agreed purchase price for said personal property, so sold and delivered was the sum of $190.60, exclusive of any state sales tax; that thereafter and prior to the commencement of this action, the said Defendant, Bismarck Lumber Company, demanded of the Plaintiff the payment of the sum of $194.41, including a state sales tax in the amount of $3.81, as the purchase price due it for the merchandise

sold and delivered as aforesaid; but that the Plaintiff has refused to pay the said state sales tax, or any part thereof.

(2) That between November 1st and November 12th, 1937, the Plaintiff purchased and received from the Defendant, Bismarck Lumber Company, and the said Bismarck Lumber Company sold and delivered to the Plaintiff at Bismarck, North Dakota, for use in repairing, maintaining, and improving the buildings located on one of its farm properties situated in Burleigh County, North Dakota, known as the Henry V. Johnson farm, certain building material, consisting of lumber; that the agreed purchase price of said lumber so sold and delivered was the sum of $16.65, exclusive of any state sales tax; that thereafter and prior to the commencement of this action, the said defendant, Bismarck Lumber Company, demanded of the Plaintiff the payment of the sum of $16.98, including a state sales tax in the amount of 33c, as the purchase price due it for the merchandise sold and delivered as aforesaid; but that the Plaintiff has refused to pay the said state sales tax, or any part thereof.

(3) That between November 1st and November 12th, 1937, the Plaintiff purchased and received from the Defendant, Bismarck Lumber Company, and the Bismarck Lumber Company sold and delivered to the Plaintiff at Bismarck, North Dakota, for use in repairing, maintaining, and improving the buildings located on one of its farm properties situated in Burleigh County, North Dakota, known as the Henry V. Johnson farm, certain building materials, consisting of lumber, shingles, sash, nails, ridge roll paper, and other like articles of merchandise; that the agreed purchase price of said personal property so sold and delivered was the sum of $149.69, exclusive of any state sales tax; that thereafter and prior to the commencement of this action, the said Defendant, Bismarck Lumber Company, demanded of the Plaintiff the payment of the sum of $152.51, including a state sales tax in the amount of $2.82, as the purchase price due it for the merchandise sold and delivered as aforesaid; but that the Plaintiff has refused to pay the said state sales tax, or any part thereof.

(4) That on November 6th, 1937, the Plaintiff purchased and received from the Defendant, Bismarck Lumber Company, and the said Bismarck Lumber Company sold and delivered to the Plaintiff at Bismarck, North Dakota, for use in repairing, maintaining, and improving the buildings located on one of its farm properties situated in Burleigh County, North Dakota, known as the Albert Kupkufski farm, certain building materials, consisting of lumber, cement, plaster, brick, shingles, kalsomine,

paint, nails, and other like articles of merchandise; that the agreed purchase price for said personal property so sold and delivered was the sum of $51.32, exclusive of any state sales tax; that thereafter and prior to the commencement of this action, the said Defendant, Bismarck Lumber Company, demanded of the Plaintiff the payment of the sum of $52.38, including a state sales tax in the amount of $1.06, as the purchase price due it for the merchandise sold and delivered as aforesaid; but that the Plaintiff has refused to pay the said state sales tax, or any part thereof.

VIII

That this action is brought under Sections 7712A1 to 7712A16, Supplement to the Compiled Laws of North Dakota for 1913, for the purpose of declaration and adjudication by the Court of the rights, status, liability, and other legal relations of the parties to this action under:

7 (1) Chapter 249 Session Laws of North Dakota for 1937, known as the State Sales Tax Act.

(2) Federal Farm Loan Act, particularly Section 26 thereof, and Acts Amendatory thereof.

(3) Constitution of the United States.

IX

That an actual controversy exists between the Plaintiff herein, on the one side, and the Defendants Bismarck Lumber Company, a Corporation, and Owen T. Owen, as Tax Commissioner of the State of North Dakota, on the other side, as to their respective rights, status, liability, and other legal relations arising out of said personal property sale transaction, and the laws applicable thereto, and particularly in respect to the legal interpretation and construction of the following State and Federal statutory provisions, to wit:

(1) Sections 2, 3, 6, 7, and Subsection 2 of Section 10 of Chapter 249 Session Laws of North Dakota for 1937, or portions thereof, as follows:

"SEC. 2. Tax Imposed.—There is hereby imposed, beginning the first day of May 1937, and ending June 30th, 1939, a tax of two percent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the State of North Dakota to consumers or users;"

* * * * *

"SEC. 3. Exemptions.—There are hereby specifically exempted from the provisions of this Act and from computation of the amount of tax imposed by it, the following:

"(A) The gross receipts from sales of tangible personal property which this state is prohibited fro mtaxing under the constitution or laws of the United States or under the constitution of this state."

* * * * *

"SEC. 6. Retailers shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such tax shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts." * * *

"SEC. 7. Unlawful Acts.—It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly, or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded."

* * * * *

"SEC. 10. Payment of Tax—Bond—Creation of Lien.—

* * * * *

2. Every retailer, at the time of making the return required hereunder, shall compute and pay to the Commissioner the tax due for the preceding period."

* * * * *

(2) Section 26, Federal Farm Loan Act (U. S. C. Title 12, Sections 931 and 933) as amended, as follows:

"Every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of Sections 761 and 781 of thi Chapter. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this chapter, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation."

* * * * *

"Nothing herein shall be construed to exempt the real property of Federal and joint stock land banks and national farm loan associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

(3) Constitution of the United States.

X

That the Plaintiff claims and alleges that it is not liable for the payment of any state sales tax on account of said personal property sale transactions, for the following legal reasons:

(1) That the Plaintiff is specifically exempted from the payment of any state sales tax under the provisions of Section 26 of the Federal Farm Loan Act and the provisions of Subsection (A), Section 3 of the State Sales Tax Act, Chapter 249, Session Laws of North Dakota for 1937.

(2) That the Federal Land Bank of Saint Paul, being an instrumentality of the United States, is not liable for the
9 payment of any state sales tax without the express consent of Congress, and that such consent has not been given.

(3) That Chapter 249, Session Laws of North Dakota for 1937, insofar as the same purports to impose a state sales tax on goods, wares, or merchandise purchased by The Federal Land Bank of Saint Paul for its use in the transaction of its business; and insofar as said statute purports to direct, authorize, and empower each retailer who sells goods, wares, or merchandise, to The Federal Land Bank of Saint Paul, to charge and collect a state sales tax thereon of two percent (2%) or the average equivalent thereof, as a part of the sale price, is null and void and in conflict with the Constitution of the United States in the following particulars, to wit:

(a) That said tax is a tax on an instrumentality of the Government of the United States, namely, The Federal Land Bank of Saint Paul.

(b) That said law, as so applied to The Federal Land Bank of Saint Paul, violates Clause 2 of Article VI of the Constitution of the United States, which provides "This Constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land; * * * anything in the Constitution or the laws of any state to the contrary notwithstanding."

(c) That said law, as so applied to The Federal Land Bank of Saint Paul, violates that part of Section 8 of Article I of the

Constitution of the United States, which provides: "The Congress shall have power: * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

XI

That the Defendants claim and contend that the Plaintiff is liable for the payment of state sales tax on account of said personal property sales transactions, and that the Defendant, Bismarck Lumber Company, is entitled to charge and collect such tax from the Plaintiff at the rate of two percent (2%) on the gross receipts from said personal property sales, as a part of the sales price therefor, in addition to the regular sales price for said merchandise; and that by virtue thereof, the Defendant, Bismarck Lumber Company, is obliged to pay to the Defendant Owen T. Owen, as Tax Commissioner of the State of North Dakota, for the use and benefit of the State of North Dakota the amount of said sales tax; and the Defendants further claim and contend that Chapter 249, Session Laws of North Dakota for 1937, insofar as the same provides for the payment by each retailer of the sales tax in the amount of two percent (2%) upon the gross receipts from all sales of personal property sold and delivered to the Plaintiff within North Dakota; and insofar as the same provides that each retailer shall add the sales tax imposed under said Act, or the average equivalent thereof, to the sales price on all personal property sold by such retailer at retail to the Plaintiff within North Dakota, is a valid and constitutional legislative enactment.

Wherefore, the Plaintiff prays that the Court adjudicate and determine the rights, liability, status, and legal relations of the parties of this action, in respect to the personal property sale transactions, statutes, and constitutional provisions herein alleged; that it be adjudged and determined that the Plaintiff is not liable for the payment of any state sales tax on account of said personal property sale transactions; that it be adjudged and determined that the Plaintiff is entitled to purchase personal property from retailers within the State of North Dakota for use in the transaction of its business without the payment of any state sales tax thereon; and for such other and further adjudications and determinations as may be necessary and proper in declaring the rights, liability, status, or other legal relations of the parties of this action, in connection with the controversy alleged herein.

11 Dated at Bismarck, North Dakota, this 9th day of March A. D., 1938.

GEO. F. SHAFER,
Attorney for the Plaintiff.
Office and Post Office Address,
Bismarck, North Dakota.

JOHN THORPE,
Attorney for the Plaintiff.
Office and Post Office Address,
346 Jackson Street, St. Paul, Minnesota.

ROBERT J. BARRY,
Of Counsel.
Office and Post Office Address,
346 Jackson Street, St. Paul, Minnesota.

Duly sworn to by Geo. F. Shafer; jurat omitted in printing.

11-A In District Court of Burleigh County

[Title omitted.]

Admission of service

Due and personal service of Summons and Complaint in the above entitled action, by receipt of a copy thereof, is hereby admitted this 9th day of March A. D. 1938, at Bismarck, North Dakota.

OWEN T. OWEN,
As Tax Commissioner of the
State of North Dakota.

11-B In District Court of Burleigh County

[Title omitted.]

Admission of Service

Due and personal service of Summons and Complaint in the above entitled action, by receipt of a copy thereof, is hereby admitted this 9th day of March A. D. 1938, at Bismarck, North Dakota.

BISMARCK LUMBER CO.
By J. A. LARSON,
President.

12 In District Court of Burleigh County

[Title omitted.]

Demurrer of defendant, Bismarck Lumber Co.

Now comes the Defendant, Bismarck Lumber Company, a corporation, and demurs to the Plaintiff's Complaint in the above-entitled action upon the ground and for the reason that the said Complaint does not state facts sufficient to constitute a cause of action.

Dated this 25th day of March A. D. 1938.

ALVIN C. STRUTZ,
Attorney General,
T. A. THOMPSON,
Assistant Attorney General,
B. F. TILLOTSON,
Assistant Attorney General,
Attorneys for Bismarck Lumber Company, a Corporation,
Bismarck, North Dakota.

13 In District Court of Burleigh County

[Title omitted.]

Demurrer of defendant, Owen T. Owen

Now comes the defendant, Owen T. Owen, as Tax Commissioner of the State of North Dakota, and demurs to the plaintiff's complaint in the above-entitled action upon the ground and for the reason that the said complaint does not state facts sufficient to constitute a cause of action.

Dated this 25th day of March A. D. 1938.

ALVIN C. STRUTZ,
Attorney General,
T. A. THOMPSON,
Assistant Attorney General,
B. F. TILLOTSON,
Assistant Attorney General,
Attorneys for Owen T. Owen,
State Tax Commissioner,
Bismarck, North Dakota.

14 In District Court of Burleigh County

[Title omitted.]

Order sustaining demurrers

The above-entitled matter having come on for hearing before the Court at the Court House in the City of Bismarck, County of Burleigh, and State of North Dakota, Honorable Fred Jansonius, District Judge, presiding, upon the Plaintiff's Complaint herein and the Defendants' Demurrers to said Complaint; Geo. F. Shafer, appearing as attorney for the Plaintiff, and Messrs. Alvin C. Strutz, Attorney General, and T. A. Thompson and B. F. Tillotson, Assistant Attorneys General, appearing as attorneys for the Defendants; and the Court having heard the arguments of counsel and being fully advised in the premises;

It is ordered by the Court that the said Defendants' Demurrers to the Complaint herein, be and the same are hereby, in all things sustained.

Dated this 6th day of May A. D. 1938.

By the Court:

FRED JANSONIUS,
Judge.

15 In District Court of Burleigh County

[Title omitted.]

Order for judgment

The above entitled matter having come on for hearing before the Court at the Court House in the City of Bismarck, County of Burleigh, and State of North Dakota, Honorable Fred Jansonius, District Judge, presiding, upon the Plaintiff's Complaint herein and the Defendants' Demurrers to said Complaint; Geo. F. Shafer, appearing as attorney for the Plaintiff, and Messrs. Alvin C. Strutz, Attorney General, and T. A. Thompson and B. F. Tillotson, Assistant Attorneys General, appearing as attorneys for the Defendants; and the Court having heard the arguments of counsel and being fully advised in the premises; and the Court having made its Order herein sustaining the Defendants' Demurrers, and the Plaintiff herein having declined to amend its Complaint;

It is ordered by the Court that in the above entitled action judgment be entered in favor of the Defendants, Bismarck Lumber Company, and Owen T. Owen, as Tax Commissioner of the State of North Dakota, and against the Plaintiff, the Federal Land Bank of Saint Paul, a body corporate, sustaining the said

Defendants' Demurrers to the Complaint, and adjudging, determining, and declaring that the Plaintiff herein is liable for and not exempt from the payment of a state sales tax under Chapter 249, Session Laws of North Dakota for 1937, known as the State Sales Tax Act; that the said Plaintiff is not entitled to purchase goods, wares, and merchandise from the Defendant, Bismarck Lumber Company, or from any other dealer, or dealers authorized to do business under the statute aforesaid, at retail within
16 the State of North Dakota, for use in the transaction of the Plaintiff's business in said State, except as otherwise provided in said State Sales Tax Act, without the payment of the state sales tax thereon as provided by said statute;

It is further ordered that the Defendant, Bismarck Lumber Company, have judgment against the Plaintiff, The Federal Land Bank of Saint Paul, a body corporate, for the amount of the said state sales tax accrued upon the purchase of such goods, wares, and merchandise, as set forth in the Complaint herein, namely, the sum of $8.02; and that the Defendants have and recover of and from the Plaintiff, their costs and disbursements herein, to be taxed and allowed by the Clerk of this Court.

Dated this 6th day of May A. D. 1938.

By the Court:

FRED JANSONIUS,
Judge.

17 In District Court, Fourth Judicial District, County of Burleigh

THE FEDERAL LAND BANK OF SANT PAUL, A BODY CORPORATE, PLAINTIFF

vs.

BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA, DEFENDANTS

Judgment

The above entitled matter having come on for hearing before the Court at the Court House in the City of Bismarck, County of Burleigh, and State of North Dakota, Honorable Fred Jansonius, District Judge, presiding, upon the Plaintiff's Complaint herein and the Defendants' Demurrers to said Complaint; Geo. F. Shafer, appearing as attorney for the Plaintiff, and Messrs. Alvin C. Strutz, Attorney General, and T. A. Thompson and B. F. Tillotson, Assistant Attorneys General, appearing as attorneys for the Defendants; and the Court having heard the

arguments of counsel and being fully advised in the premises: and the Court having made its Order herein sustained the Defendants' Demurrers, and the Plaintiff herein having declined to amend its Complaint; and the Court having made its Order for Judgment herein in favor of the Defendants and against the Plaintiff;

It is adjudged, considered, determined, and declared by the Court that the Defendants, Bismarck Lumber Company, and Owen T. Owen, as Tax Commissioner of the State of North Dakota do have and recover judgment against the Plaintiff, The Federal Land Bank of Saint Paul, a body corporate, herein, that said Defendants' Demurrers to the Complaint be and the same are sustained; that the Plaintiff is liable for and not exempt from the payment of a state sales tax under the provisions of Chapter 249, Session Laws of North Dakota for 1937, known as the State Sales Tax Act; that the said Plaintiff is not entitled to purchase goods, wares, and merchandise from the Defendant, Bismarck Lumber Company, or from any other dealer, or dealers,
18 authorized to do business under the statute aforesaid, at retail within the State of North Dakota, for use in the transaction of the Plaintiff's business in said State, except as otherwise provided in said State Sales Tax Act, without the payment of the state sales tax thereon as provided by said statute;

It is further adjudged, considered, determined, and declared that the Defendant, Bismarck Lumber Company, have judgment against the Plaintiff, The Federal Land Bank of Saint Paul, a body corporate, for the amount of the said state sales tax accrued upon the purchase of such goods, wares, and merchandise, as set forth in the Complaint herein, namely the sum of $8.02; and that the Defendants have and recover of and from the Plaintiff, their costs and disbursements herein, taxed and allowed in the sum of $ none.

Witness the Hon. Fred Jansonius, Judge of the District Court in and for the County of Burleigh, Fourth Judicial District, of the State of North Dakota, and my hand and the seal of said Court on this 6th day of May A. D. 1938.

[SEAL.] CHAS. FISHER,
Clerk of said Court.

19 In District Court of Burleigh County

[Title omitted.]

Notice of appeal

To the above-named Defendants, and to Messrs. Alvin C. Strutz, Attorney General, and T. A. Thompson and B. F. Tillotson, Assistant Attorneys General, Attorneys for said Defendants:

You and each of you, will please take notice that the above-named Plaintiff and Appellant hereby appeals to the Supreme Court of the State of North Dakota from that certain judgment rendered in the District Court of Burleigh County, on the 6th day of May 1938, in the above entitled action, in favor of the Defendants and against the Plaintiff, and from the whole thereof.

Dated at Bismarck, North Dakota, this 7th day of May 1938.

GEO. F. SHAFER,
Attorney for the Plaintiff and Appellant,
Office and Post Office Address,
Bismarck, North Dakota.

JOHN THORPE,
Attorney for the Plaintiff and Appellant,
Office and Post Office Address,
321 Jackson Street, St. Paul, Minn.

ROBERT J. BARRY,
Of Counsel,
Office and Post Office Address,
321 Jackson Street, St. Paul, Minn.

20 In District Court of Burleigh County

[Title omitted.]

Specifications of error

The Plaintiff and Appellant hereby specifies the following errors on its appeal herein:

I

That the District Court erred in making its Order for Judgment in the above-entitled action, dated May 6, 1938, wherein the Court ordered judgment as follows:

"It is ordered by the Court that in the above entitled action judgment be entered in favor of the Defendants, Bismarck Lumber Company, and Owen T. Owen, as Tax Commissioner of the State of North Dakota, and against the Plaintiff, The Federal Land Bank of Saint Paul, a body corporate, sustaining the said Defendants' Demurrers to the Complaint, and adjudging, determining, and declaring that the Plaintiff herein is liable for and not exempt from the payment of a state sales tax under Chapter 249, Session Laws of North Dakota for 1937, known as the State Sales Tax Act; that the said Plaintiff is not entitled to purchase

goods, wares, and merchandise from the Defendant, Bismarck Lumber Company, or from any other dealer, or dealers authorized to do business under the statute aforesaid, at retail within the State of North Dakota, for use in the transaction of the Plaintiff's business in said State, except as otherwise provided in said State Sales Tax Act, without the payment of the state sales tax thereon as provided by said statute:

"It is further ordered that the Defendant, Bismarck Lumber Company, have judgment against the Plaintiff, The Federal Land Bank of Saint Paul, a body corporate, for the amount of the said state sales tax accrued upon the purchase of such goods, wares, and merchandise, as set forth in the Complaint herein, namely, the sum of $8.02; and that the Defendants have and recover of and from the Plaintiff, their costs and disbursements herein, to be taxed and allowed by the Clerk of this Court."

II

That the District Court erred in rendering that certain Judgment in the above entitled action, dated May 6, 1938, in
21 favor of the Defendants and against the Plaintiff, wherein the Court adjudged, determined and declared as follows:

"It is adjudged, considered, determined, and declared by the Court that the Defendants, Bismarck Lumber Company, and Owen T. Owen, as Tax Commissioner of the State of North Dakota, do have and recover judgment against the Plaintiff, The Federal Land Bank of Saint Paul, a body corporate, herein, that said Defendants' Demurrers to the Complaint be and the same are sustained; that the Plaintiff is liable for and not exempt from the payment of a state sales tax under the provisions of Chapter 249, Session Laws of North Dakota for 1937, known as the State Sales Tax Act; that the said Plaintiff is not entitled to purchase goods, wares, and merchandise from the Defendant, Bismarck Lumber Company, or from any other dealer, or dealers, authorized to do business under the statute aforesaid, at retail within the State of North Dakota, for use in the transaction of the Plaintiff's business in said State, except as otherwise provided in said State Sales Tax Act, without the payment of the state sales tax thereon as provided by said statute:

"It is further adjudged, considered, determined, and declared that the Defendant, Bismarck Lumber Company, have judgment against the Plaintiff, The Federal Land Bank of Saint Paul, a body corporate, for the amount of the said state sales tax accrued upon the purchase of such goods, wares, and merchandise, as set forth in the Complaint herein, namely, the sum of $8.02; and that

the Defendants have and recover of and from the Plaintiff, their costs and disbursements herein, taxed and allowed in the sum of $ none."

III

That the District Court erred in failing and refusing to grant judgment upon the pleadings in this action in favor of the Plaintiff and against the Defendants for the specific relief demanded in the Complaint; and particularly for failing and refusing to adjudge and declare as follows:

(1) That the Plaintiff is specifically exempted from the payment of any state sales tax under the provisions of Section 26 of the Federal Farm Loan Act and the provisions of Subsection (A), Section 3 of the State Sales Tax Act, Chapter 249, Session Laws of North Dakota for 1937.

(2) That the Federal Land Bank of Saint Paul is an instrumentality of the United States, and as such instrumentality, is not liable for the payment of any state sales tax without
22 the express consent of Congress, and that such consent has not been given.

(3) That Chapter 249, Session Laws of North Dakota for 1937, insofar as the same purports to impose a state sales tax on goods, wares, or merchandise, purchased by The Federal Land Bank of Saint Paul for its use in the transaction of its business, and insofar as said statute purports to direct, authorize, and empower each retailer who sells goods, wares, or merchandise to The Federal Land Bank of Saint Paul, to charge and collect a state sales tax thereon of two per cent (2%) or the average equivalent thereof, as a part of the sale price, is null and void and in conflict with the Constitution of the United States in the following particulars, to wit:

(a) That said tax is a tax on an instrumentality of the Government of the United States, namely, The Federal Land Bank of Saint Paul.

(b) That said law, as so applied to The Federal Land Bank of Saint Paul, violates Clause 2 of Article VI of the Constitution of the United States, which provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land; * * * anything in the Constitution or the laws of any state to the contrary notwithstanding."

(c) That said law, as so applied to The Federal Land Bank of Saint Paul, violates that part of Section 8 of Article I of the Constitution of the United States, which provides: "The Con-

gress shall have power: * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

IV

That the District Court erred in failing and refusing to grant judgment upon the pleadings in this action in favor of the Plaintiff and against the Defendants, to the effect that the Plaintiff is not liable for the payment of any state sales tax on
23 account of the personal property sales transactions alleged in the Complaint, and that the Plaintiff is entitled to purchase personal property from retailers within the State of North Dakota for use in the transaction of its business without payment of any state sales tax thereon.

Dated this 7th day of May 1938, at Bismarck, North Dakota.

GEO. F. SHAFER.
Attorney for the Plaintiff and Appellant,
Office and Post Office Address,
Bismarck, North Dakota.

JOHN THORPE.
Attorney for the Plaintiff and Appellant,
Office and Post Office Address,
316 Jackson Street, St. Paul, Minn.

ROBERT J. BARRY.
Of Counsel,
Office and Post Office Address,
316 Jackson Street, St. Paul, Minn.

24 In District Court of Burleigh County

[Title omitted.]

Stipulation waiving undertaking for costs on appeal

Whereas, the Plaintiff and Appellant is about to take an appeal to the Supreme Court of the State of North Dakota, from that certain Judgment rendered in the District Court of Burleigh County, in the above-entitled action, in favor of the Defendants, and against the Plaintiff, on the 6th day of May 1938;

Now, therefore, it is hereby Stipulated by and between the parties hereto, by and thru their respective attorneys, that

an Undertaking for Costs upon such Appeal shall not be required of the Plaintiff and Appellant, and the same is hereby waived.

Dated this 7th day of May 1938, at Bismarck, North Dakota.

GEO. F. SHAFER,
JOHN THORPE,
ROBERT J. BARRY,
Attorneys for the Plaintiff and Appellant.

ALVIN C. STRUTZ,
Attorney General of the State of North Dakota.

T. A. THOMPSON,
Assistant Attorney General,

B. F. TILLOTSON,
Assistant Attorney General,
Attorneys for the Defendants and Respondents.

25 [Clerk's certificate to foregoing transcript omitted in printing.]

26 In Supreme Court of North Dakota

File No. 6549

THE FEDERAL LAND BANK OF SAINT PAUL, A BODY CORPORATE,
APPELLANT

vs.

BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS STATE TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA,
RESPONDENTS

Minute entry of argument and submission

June 14, 1938

Appearances: For the Appellant, Mr. Geo. F. Shafer, Mr. John Thorpe, and Mr. Peyton R. Evans; contra, Mr. B. F. Tillotson, Assistant Attorney General.

Cause argued, submitted, and taken under advisement.

Morris and Sathre, JJ., being disqualified, did not sit on the argument of the above causes. Hon P. G. Swenson, Judge of the First Judicial District, and Hon. G. Grimson, Judge of Second Judicial District, sitting in their stead.

27 In Supreme Court of North Dakota

[Title omitted.]

Minute entry of reargument and submission

July 26, 1939

Appearances: For the Appellant: Mr. Geo. F. Shafer; contra, Mr. B. F. Tillotson, Assistant Attorney General.

Cause re-argued, submitted, and taken under advisement.

Morris and Burke, JJ. did not participate, Hon. P. G. Swenson, Judge of the First Judicial District, and Hon. G. Grimson, Judge of Second Judicial District, sitting in their stead.

28 In Supreme Court of North Dakota

File No. 6549

THE FEDERAL LAND BANK OF ST. PAUL, A BODY CORPORATE, PLAINTIFF AND APPELLANT

vs.

BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA, DEFENDANTS AND RESPONDENTS

Judgment

Filed March 17, 1941

This action coming on to be heard at the June A. D. 1939 term of this Court at the Supreme Court rooms in the City of Bismarck, State of North Dakota:

Present: W. L. Nuessle, Chief Justice: A. M. Christianson, A. G. Burr and P. G. Swenson, and G. Grimson, Associate Justices; and the appeal herein having been reargued by Mr. George F. Shafer for the Appellant, and by Mr. B. F. Tillotson, Assistant Attorney General, for Respondents, and the court having been advised thereon, it is now considered, ordered and adjudged that the judgment of the said District Court within and for said Burleigh County appealed from herein, be, and the same is, hereby affirmed.

And it is further ordered, that this cause be, and it is hereby, remanded to the District Court for further proceedings according to law, and the order of this court.

And it is further considered and adjudged, that Respondents have and recover of the Appellant costs and disbursements on this

appeal expended, to be taxed and allowed in the District Court.
Dated March 17, 1941.
By the Court,

A. G. BURR.
Now Chief Justice.

Attest:
[SEAL] J. H. NEWTON, Clerk.

[File Endorsement omitted.]

29 In Supreme Court of North Dakota

[File endorsement omitted.]

THE FEDERAL LAND BANK OF ST. PAUL, A BODY CORPORATE, PLAINTIFF AND APPELLANT

vs.

BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA, DEFENDANTS AND RESPONDENTS

1. The tax imposed by the State Sales Tax Act (Chapter 249, Session Laws 1937), is laid upon the buyer and not upon the seller. Jewel Tea Company v. State Tax Commissioner, 70 N. D. —, 293 N. W. 386.

2. The entire power of taxation abides in the states and except as restrained by the Constitution of the United States, the power of the states to tax is absolute.

3. The test as to whether a tax laid on a federal instrumentality is constitutional and valid, is, does it hinder or embarrass the instrumentality in the performance of its governmental functions. If it does, it is unconstitutional. If it does not, it is valid.

4. The tax laid under the State Sales Tax Act (Chapter 249, Session Laws 1937) on sales to a federal land bank of lumber and other building material to be used in the conservation and repair of buildings and fences on farm lands acquired by the bank through the foreclosure of mortgages securing farm loans made pursuant to the Federal Farm Loan Act (Chapter 245, 39 Stats. 360, 12 U. S. C. A., sections 641 et seq.), and acts amendatory thereto, is, for reasons stated in the opinion, a valid and constitutional tax.

(Syllabus by the Court)

From a judgment of the District Court of Burleigh County, Honorable Fred Jansonius, Judge, plaintiff appeals.

30 Affirmed.

Opinion of the Court by Nuessle, J.

George F. Shafer, of Bismarck, and John Thorpe, of St. Paul, Minnesota, attorneys for the appellant.

Peyton R. Evans and Gerald E. Lyons, of Washington, and Robert J. Barry, of St. Paul (of Counsel).

Alvin C. Strutz, Attorney General, and T. A. Thompson and B. F. Tillotson, Assistant Attorneys General, of Bismarck, for respondents.

31 FEDERAL LAND BANK OF ST. PAUL

v.

BISMARCK LUMBER CO. ET AL.

Opinion

Filed March 17, 1941

NUESSLE, J. The question for determination in this case is as to whether the Federal Land Bank of St. Paul, hereinafter referred to as the appellant, is subject to the North Dakota Sales Tax on purchases made under the circumstances hereinafter disclosed.

The Sales Tax Act (chapter 249, Session Laws 1937) in force at the time this controversy arose, provides:

"SEC. 2. There is hereby imposed * * * a tax of two per cent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the State of North Dakota to consumers or users * * *.

"SEC. 3. There are hereby specifically exempted from the provisions of this Act and from computation of the amount of tax imposed by it, the following:

"(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State * * *."

The appellant, the Federal Land Bank of St. Paul, a body corporate, created pursuant to the Act of Congress, approved July 17, 1916 (chapter 245, 39 Stats. 360, 12 U. S. C. A., sec. 641 et seq.), and acts amendatory thereof, known and cited as the Federal Farm Loan Act, is engaged in the business of making loans to farmers in the state of North Dakota and states adjacent thereto. The respondent, The Bismarck Lumber Company, is engaged in the business of selling lumber and other building material as a retail dealer in Bismarck. In October, 1937, the appellant bought certain lumber and other building material from

the respondent. This material was for use in repairing and improving the buildings and fences on certain farm lands owned by the appellant in North Dakota. These lands had been
32 acquired by appellant through the foreclosure of mortgages taken to secure farm loans made in the course of its business. The respondent added to the regular sales price of the material so bought, two per cent thereof, the amount of the state sales tax, reckoned pursuant to the provisions of section 2 of the Sales Tax Act, supra. The appellant paid the sales price but refused to pay the tax, claiming that no tax could be collected from it for the reason that it was an agent and instrumentality of the federal government and, therefore, exempt from any state taxation. The respondent, on the other hand, contended that the material so sold by it was subject to such tax and that it was its duty to collect the same. Action was then brought by the appellant to determine the controversy thus arising and for a declaratory judgment adjudicating and determining the rights, liabilities, status, and legal relations of the parties, and whether the sales in question were subject to the tax. The State Tax Commissioner was joined as a party defendant. The controversy was submitted to the District Court of Burleigh County and that court held that the sales made to the appellant Bank by the respondent Lumber Company were subject to the tax; that the lumber Company was required to collect and pay over to the State the tax on such sales, and that the appellant Bank was under legal obligation to pay the same. Judgment was entered accordingly. Thereupon the Bank perfected the instant appeal.

The tax here in question is imposed on retail sales. It is general in its operation. It is required to be paid by the buyer. Jewel Tea Company v. State Tax Commissioner, 70 N. D. —, 293 N. W. 386.

The appellant contends it is wholly exempt from the tax pursuant to section 3a of the Sales Tax Act, supra, since it is an instrumentality of the United States and, as such, is not liable for the payment of any state sales tax without the consent of Congress; that such consent has not only not been given,
33 but on the contrary, by section 26 of the Farm Loan Act, the appellant has been expressly exempted from the payment of such tax. The appellant further contends that as it is an instrumentality of the federal government, the State Sales Tax Act, supra, is, as attempted to be applied in this case, null and void and in conflict with the Constitution of the United States in that it violates section 8 of Article 1 of the Constitution, which provides:

"The Congress shall have power * * * to make all laws which shall be necessary and proper for carrying into execution

the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

and clause 2 of Article 6 of the Constitution, which provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof: * * * shall be the supreme law of the land: * * * anything in the Constitution or the laws of any state to the contrary notwithstanding."

The issues thus made are so important and their solution so difficult, that we deem it necessary to consider somewhat at length the powers and rights of the federal and state governments with respect to the matter of taxation.

As we read the authorities they establish beyond question that the fact that Congress may have decreed an exemption from state taxation is not in itself enough. Though Congress may waive immunity from taxation, it cannot by its mere fiat confer immunity. Its action in that respect must be grounded upon a constitutional foundation. It must be predicated upon the proposition that "the states have no power by taxation or otherwise to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." M'Culloch v. The State of Maryland et al., 4 Wheat. 316, 4 L. ed. 579; Osborn et al. v. The Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Clallam County v. United States, 263 U. S. 341, 44 S. Ct. 121, 68 L. ed. 328. But except as thus restrained the power of the states to tax is absolute.

34

We have found no better statement respecting the concurrent power of taxation of the national and state governments and the manner of the exercise of that power than that of Mr. Justice Strong in Union Pacific R. R. Company v. Peniston, 18 Wall. 5, 21 L. ed. 787, which we quote:

"As was said in Lane County v. Oregon, 7 Wall. 77, 19 L. ed. 101: 'In respect to property, business, and persons within their respective limits, the power of taxation of the states remained, and remains entire, notwithstanding the Constitution.' It is indeed, a concurrent power (concurrent with that of the general government), and in the case of a tax upon the same subject by both governments, the claim of the United States as the supreme authority must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the states commit the exercise of the power. That discretion is restrained only by the will of the people expressed

in the state constitutions, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National Government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the
35 extent just indicated, it is as complete in the states as the like power within the limits of the Constitution is complete in Congress. Such are the opinions we have expressed heretofore, and we adhere to them now.

"There are, we admit, certain subjects of taxation which are withdrawn from the power of the states, not by any direct or express provision of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the National Government is ligitimately exercised within the states. While it is true that government cannot exercise its power of taxation so as to destroy the state governments, or embarrass their lawful action, it is equally true that the states may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National Government. The constitution contemplates that none of these powers may be restrained by state legislation. But it is often a difficult question whether a tax imposed by a state does in fact invade the domain of the general government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a state tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes must be laid. The states are, and they must ever be, coexistent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise."

The pronouncement of Mr. Chief Justice Marshall in M'Culloch v. The State of Maryland, supra, that the power to tax involves the power to destroy, is now accepted as axiomatic. But considering the relationship of the federal and state governments, it is just as true that the power to exempt from taxation involves the power to destroy. Death may ensue as well from starvation as from strangulation. So, as was said in Union Pacific R. R. Company v. Peniston, supra:

"The states are, and they must ever be, coexistent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise."

36 And the same thought is expressed in Metcalf v. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. ed. 384, where it is said: "But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence, the limitation upon the taxing powers of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax or the appropriate exercise of the functions of the government affected by it.

"While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of the tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power."

The foregoing excerpt is quoted with approval in James v. Dravo Contracting Company, 302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155, 114 A. L. R. 318. Again in Educational Films Corporation v. Ward, 282 U. S. 399, 75 L. ed. 400, 51 S. Ct. 170, 71 A. L. R. 1226, it is held: "The immunity of Federal instrumentalities from state taxation must be given such a practical construction as will not, on the one hand, unduly restrict the power of the government imposing the tax, or, on the other hand, the exercise of the functions of the government which may be affected by it."

The reasoning of the opinion in M'Culloch v. State of Maryland, supra, is that the federal government can act only through agents; that it may employ such agents or agencies as it deems advisable, so it may create corporate agencies to execute its powers; that the states may not so tax its agents, whether individual or corporate, as to hinder or embarrass them in the

37 performance of their governmental duties. The test is: Does the tax sought to be imposed obstruct governmental operations? If it does, it is unconstitutional. If it does not, it is

valid. And this is a judicial and not an administrative or legislative question.

If a designated agent is an individual, no tax may be imposed that will in any way interfere with the performance of his governmental functions. But, in all other respects, he is subject to taxation the same as any other citizen, and the same rule applies with respect to corporate agencies.

"* * * and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of state legislation. The most important agents of the Federal Government are its officers; but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. * * * The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." First National Bank v. Commonwealth of Kentucky, 9 Wall. 353, 76 U. S. —, 19 L. ed. 701, 703.

So a corporate agency is as much amenable to the tax laws of the states as is an individual agent. Accordingly, if a governmental agent engages in an enterprise which is not essential to the performance of his or its services to the government, to that extent he or it is subject to state taxation. This is wholly consistent with the concluding paragraph of the opinion in M'Culloch v. Maryland, supra:

38 "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank and is, consequently, a tax on the operation of an instrument

employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

And it is likewise consistent with what is said in Osborn et al. v. The Bank of the United States, supra, where the holding in M'Culloch v. Maryland was reexamined.

"We do not maintain that the corporate character of the bank exempts its operations from the action of state authority. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially."

The Federal Farm Loan Act provides that the banks created pursuant to its provisions may be designated "depositaries of public moneys * * *; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties as depositaries of public money as financial agents of the Government as may be required of them." Section 701, 12 U. S. C. A. The banks are also empowered to invest their funds in the purchase of qualified first mortgages on land situated within the land bank district within which they are organized or for which they are acting. Section 781, 12 U. S. C. A. We had occasion to consider the manner of the exercise of this power to some extent in Byrne v. Federal Land Bank of St. Paul, 61 N. D. 265, 237 N. W. 797. With respect to the matter of taxation material here, section 26 of the act (sections 931–933, 12 U. S. C. A.) provides:

39 "SEC. 931. Every federal land bank and every national farm loan association, including the capital and reserve or surplus therein, and the income derived therefrom, shall be exempt from federal, state, municipal and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section 761 and section 781 of this chapter. First mortgages executed to federal land banks or to joint stock land banks and farm loan bonds issued under the provisions of this act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such, they

and the income derived therefrom shall be exempt from Federal, State, municipal and local taxation * * *."

SEC. 933. Nothing herein shall be construed to exempt the real property of Federal and joint stock land banks and national farm loan associations from either State, county, or municipal taxes to the same extent, according to its value, as other real property is taxed."

The constitutionality of the original Farm Loan Act was challenged in Smith v. Kansas City Title & Trust Company, 255 U. S. 180, 41 S. Ct. 243, 65 L. ed. 577, on the ground that the designation of the banks created by the act as fiscal agents and instrumentalities of the government was but a pretext; that the banks were, in fact, created for the purpose of loaning money on farm mortgages; that this was essentially a private business and accordingly Congress had no power to endow the banks with the right to engage in that business and to exempt bonds issued by them from taxation.

The court held, however, "that the creation of these banks and the grant of authority to them to act for the government as depositaries of public moneys and purchasers of government bonds, brings them within the creative power of Congress though they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm securities at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States Bank, or the authority given to national banks to carry on additional activities destroyed the authority of Congress to create those institutions." The clear implication of what is thus said by the court is that the making of loans on farm security is a private business, not governmental in character. That it is an activity additional but not essential to that which the banks were created to perform. And certainly there is nothing there said to imply that, so far as "these other privileges and duties to facilitate the making of loans upon farm securities" are concerned, the states are powerless to tax.

The court cited as an authority sustaining this holding in the Smith case, the case of First National Bank v. Fellows, 244 U. S. 416, 37 S. Ct. 734, 61 L. ed. 1233, L. R. A. 1918C, 283, Ann. Cases 1918D, 1169. In the Fellows case, the power of a national bank under the act of December 23, 1913, (38 Stats. at L., 262, chap. 6, 6 Fed. Stats. Ann. (2nd ed.) 817, section 11 (k),) to act as trustee, executor, administrator or registrar of stocks and bonds "when not in contravention of state or local law" was challenged by the attorney general of the state of Michigan. See Fellows, Attorney General ex rel. Union Trust Company, et al. v. First

National Bank of Bay City, 192 Mich. 640, 159 N. W. 335. The attorney general contended that this act conferred on national banks, powers in excess of the authority of Congress and was, therefore, in contravention of the constitution. It appears that the laws of Michigan authorized corporations to perform the functions in question. The court denied the attorney general's challenge on the authority of M'Culloch v. Maryland, supra, and Osborn et al. v. The Bank of the United States, supra, and said:

"What those cases established was that although a business was of a private nature and subject to state regulation, if it was of such a character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it was competent for Congress to give the bank the power to exercise such private business in cooperation with or as part of its public authority. Manifestly this excluded the power of the state in such case, although it might possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function, since to do so would be but the exer-
41 tion of state authority to prohibit Congress from exerting a power which, under the Constitution it had a right to exercise. From this it must also follow that even although a business be of such a character that it is not inherently considered susceptible of being included by Congress in the powers conferred on national banks, that rule would cease to apply if by state law state banking corporations, trust companies, or others which by reason of their business are rivals or quasi-rivals of national banks are permitted to carry on such business. This must be since the State may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of national banks and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency. Of course as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers."

As we read the opinion in Bank v. Fellows, supra, the effect of the court's holding is that Congress has the power to confer upon governmental agencies and instrumentalities the right to exercise functions which are not, in the first instance, essential to enable those agencies to perform their duties efficiently as

such, if, under the laws of the state in which they may be located private institutions somewhat competitive in character ("rivals or quasi-rivals") have the right to perform similar functions and thereby are enabled to compete with the governmental agencies on a favored footing in the carrying on of business. But the court recognized that in such case the state was not barred from exercising the right of regulation, for the court said:

"Of course as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers."

42 It would seem, by parity of reasoning, that since business as carried on by private competitive enterprise is subject to the state's burden of taxation, to exempt governmental instrumentalities engaged in business not governmental in character from such burden must operate, so far as competitive business is concerned, to the detriment of private enterprise, and thus to the great disadvantage of the states. If this be true, there cannot be in such case that "harmonious and concordant exercise of national and state powers" contemplated and necessary under our theory of government.

There is another principle that should be taken into account in considering whether or not enterprises, private in character, carried on by governmental agencies in addition to though not essential to the performance of their governmental functions, shall be subject to taxation by the states. It was held in the early case of Bank of the United States v. Planters Bank of Georgia, 9 Wheat. 904, 6 L. ed. 244, in an opinion written by Chief Justice Marshall, that:

"It is, we think, a sound principle, that when a government becomes a partner in any trading company it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted."

So far as we can discover, there has never been any departure from that holding. On the contrary, it has been reaffirmed again and again. As, for instance, in the case of South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110, 50 L. ed. 261, 4 Ann. Cases 737. There it appears that the State of South Carolina

had established dispensaries for the wholesale and retail sale of liquor and prohibited sale by others than the dispensaries. The United States demanded the license tax prescribed by the In-
43 ternal Revenue Act for dealers in intoxicating liquors and the state paid the same. Thereafter the state commenced an action in the court of claims to recover the amount thus paid. Judgment was entered for the United States. The state appealed. The Supreme Court affirmed the judgment and, among other things, speaking through Mr. Justice Brewer said:

"The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. Vance v. W. A. Vandercook Co., 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the state to take possession in like manner of tobacco, oleomargarine, and all other objects of internal revenue tax. If one state finds it thus profitable, other states may follow, and the whole body of internal revenue tax be thus stricken down.

"More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed 'public utilities' including not merely therein the supply of gas and water but also the entire railroad system * * *.

"We may even go a step further. There are some insisting that the state shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any state, how much would that state contribute to the revenue of the nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a state assumes, under its police power, the control of all those matters subject to the internal revenue tax, and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a state of liquor, tobacco, etc., from a license tax, would exempt the importation of merchandise by a state from import duty. While the state might not prohibit importations, as it can the sale of liquor, by private individuals, yet, paying no import duty, it could undersell all individuals, and so monopolize the importation and sale of foreign goods.

"Obviously, if the power of the state is carried to the extent suggested, and with it is relief from all Federal taxation, the national government would be largely crippled in its revenues. Indeed, if all the states should concur in exercising their powers

to the full extent, it would be almost impossible for the nation to collect any revenues. In other words, in this indirect way it would be within the competency of the states to practically destroy the efficiency of the national government."

44 In this connection, in addition to the authorities cited in South Carolina v. United States, see, State of North Dakota v. Olson, 33 Fed. (2d) 848, and cases cited; Clinton v. State Tax Commission et al., 146 Kan. 407, 71 Pac. (2d) 857, and cases cited; Central Market Inc. v. King, 132 Neb. 380, 272 N. W. 244.

We come now to the facts in the instant case. The appellant, Federal Land Bank, is engaged in the business of loaning money to farm owners. It secures these loans by mortgages upon farms. Certain of its mortgagors defaulted. Appellant foreclosed and acquired title to the security. Some of the lands thus acquired had buildings on them. The buildings were in disrepair. Lumber was required to repair them in order to conserve the buildings and make them habitable for tenants. Appellant bought lumber to make these repairs. The State seeks to impose the sales tax here challenged—a tax which all other purchasers of lumber must pay. The appellant claims immunity from the tax on the ground that it is a federal instrumentality. If we read the case of M'Culloch v. Maryland, supra, aright, that claim must be predicated on the theory that to exact the tax would constitute an interference with the operations of the federal government. There can be no ground for such a contention here. It is true that the tenuous device resorted to by Congress to clothe the federal land banks in the garb of governmental instrumentalities and thus render their bonds tax exempt was held sufficient. Smith v. Kansas City Title & Trust Company, supra. And in Federal Land Bank v. Crosland, 261 U. S. 374, 43 S. Ct. 385, 67 L. ed. 703, 29 A. L. R. 1, the exemption from taxation of the real estate mortgages taken by the banks was sustained. But it is one thing to hold the bonds of the land banks and the securities on which they are based tax exempt, and quite another to say that this tax exemption can be projected to so remote a business transaction as the purchase of lumber to repair buildings on

45 lands acquired by the banks in an enterprise additional to rather than incidental or related to the ostensible governmental purposes for which they were created. Certainly the imposition of the tax on the transaction here in question could not hinder or embarrass the performance of the governmental functions—acting as a depositary and financial agent and buying government securities—the appellant was created to perform. Shadow ought not to be confused with substance. "The rule that governmental instrumentalities are immune from taxation will

not be mechanically applied regardless of the consequence to the operations of government." Educational Films Corporation of America v. Ward, supra. And we cannot believe that the mere designation of an individual or corporation as a governmental agent confers on Congress the power to absolve every transaction in which that agent may engage or the property used or acquired in those transactions from liability to taxation in the state taxing district wherein the transactions are performed or the property held.

There has been an accelerating tendency to encroach in this direction on the rights of the states and to constrict their powers. This is made possible only by a disregard of the above rule which is but a restatement of the principle laid down in M'Culloch v. Maryland, and Osborn v. Bank of the United States, supra. We quote again from the latter case:

"We do not maintain that the corporate character of the bank exempts its operations from the action of state authority. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate
46 character is merely an incident, which enables it to transact that business more beneficially."

The confusion, and consequent disregard of the principle above stated, has arisen because of failure to distinguish between operations essential to the performance of governmental service and operations additional but not essential to the performance of that service. This distinction is emphasized in First National Bank v. Commonwealth of Kentucky, supra, where it is said:

"But it is argued that the banks, being instrumentalities of the Federal Government, by which some of its important operations are conducted, cannot be subject to such state legislation. It is certainly true that the Bank of the United States and its capital were held to be exempt from that state taxation on the ground here stated, and this principle laid down in the case of M'Culloch v. The State of Maryland, 4 Wheat. 316, has been repeatedly affirmed by the court. But the doctrine has its foundation in the

proposition that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the states * * *. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal Government are only exempted from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States."

In First National Bank v. Fellows, supra, the court sustained the power of Congress to endow national banks with the authority to perform functions additional but not essential to their governmental functions. But this was solely on the theory that unless the banks possessed that additional power they would not be in a position of equality in competition with private enterprise carrying on the banking business. And Mr. Chief Justice White
47 was careful to say that in such case reasonable state regulations would be controlling. Accordingly, Congress may properly create corporations to act as governmental agents to execute any powers the government may possess. And these agents may be endowed with additional powers. But in view of the distinction made as between operations essential to the performance of governmental service and operations additional but not essential to the performance of that service, it follows that if those powers be not essential to the exercise of the governmental powers they must be considered and treated for all purposes the same as though exercised by individuals similarly engaged in governmental business or by any purely private enterprise. Otherwise, the federal government may embark in any business anywhere, any time, in competition with private enterprise, untrammeled by the regulations and free from the burden of taxation to which private enterprise is subject—something undreamed of by the framers of the Constitution and something not contemplated when the opinions in M'Culloch v. Maryland and Osborn v. Bank of the United States were written.

The power of Congress to create the Federal Land Banks was sustained because of "the grant of authority to them to act for the government as depositaries of public moneys and purchasers of government bonds." Smith v. Kansas City Title & Trust Company, supra. These then are the governmental functions they are to perform. Thence springs their immunity from taxation. As a matter of fact, these functions could as well be effected by pri-

vate bankers. For a private banker could serve as a depositary, a financial agent, and a purchaser of government securities. That the land banks are corporations is merely an incident which does not in the least effect the states' power to tax. "We do not maintain that the corporate character of the bank exempts its operations from the action of state authority. If an individual were to be endowed with the same faculties for the same purpose, he would be equally protected in the exercise of those functions." Per Mr. Chief Justice Marshall in Osborn v. The United States
48 Bank, supra. Yet, if a private banker were appointed a government agent to perform these services (and the instance has been known) who would be so bold as to say that he thus was absolved from state taxation and other requirements to which other citizens not government agents were subject regardless of whether his operations in behalf of the government were thereby in any manner hampered or obstructed.

Loaning money at interest to private enterprise is not a governmental function. The fact that a loan is made to a farmer does not distinguish it in this respect from a loan made to a butcher, a baker, or a candlestickmaker. When the land banks engage in this business, though they be governmental instrumentalities, they do not change its character. They operate in a private field for private profit in competition with private enterprise. It is true that because of congressional favor they have the advantage of an inexhaustible source from which to draw in making their loans and at a most advantageous rate of interest. But the stock of the banks is, in the main, privately owned. Indeed, it all may be owned privately. If there be dividends, the government does not participate though it own stock. Private owners of stock do participate. The banks are not banks of general deposit and discount. The business done by them provides no outlet for governmental securities, because, forsooth, the funds in the banks are obtained from the government itself, except insofar as their stocks and bonds are purchased and paid for by others than the government. And the theory of the Land Bank Act is that money thus derived is to be used in making the farm loans on which the bonds are based. In Federal Land Bank v. Priddy, 295 U. S. 229, 55 S. Ct. 705, 79 L. ed. 1408, the court, after analyzing the statute creating the land banks has this to say concerning them: "They thus have many of the characteristics of private business corporations distinguishing them from the government itself and its municipal subdivisions and from corporations wholly government owned and created to effect an exclusively governmental purpose."

49 Since the farm loan business is not a business that is essential to enable the banks to perform the governmental function from which their tax immunity springs, to hold that the

appellant is immune from the tax here in question is, in effect, to hold that Congress may by its mere declaration empower an agency, created as appellant was created, to engage in any business and exempt it from taxation however remote or inconsequential the effect of the tax burden may be upon the exercise of its governmental function. Let us pursue the practical application of such a holding in the instant case to its logical consequences. If the appellant can repair the buildings on its farms without paying the tax required of other purchasers of lumber to make similar repairs, by the same token it can buy machinery and equipment to operate those farms without paying the tax that other farmers must pay. It can employ men to operate those farms and provide them with groceries and other supplies which private enterprise similarly engaged must pay. It can buy logs or set up lumber camps and log them itself; it can build mills and mill its own lumber; it can erect factories and operate stores and distributing plants—all free from state regulation and taxation. And so on ad infinitum. And the effect with respect to the states will be infinitely more disastrous than that which is envisioned with respect to the national government in South Carolina v. United States, supra. For individual initiative, lacking inducement, will languish; private enterprise, stifled by privileged and unburdened competition, will wither; and the states, their sources of sustaining revenue usurped and dried up, will starve.

In view of the foregoing considerations, we reach the conclusion that the tax here challenged meets the test laid down in M'Culloch v. Maryland, supra, and Osborn v. Bank of the United States, supra. It is a valid exercise of the inherent taxing power abiding in the states. Its imposition in no way obstructs or interferes with the governmental function the appellant land bank was created to perform. It does not burden or embarrass the constitutional operations of the national government. Accordingly, the State Sales Tax Act as applied in the instant case violates neither section 8 or Article 1, nor clause 2 of Article 6 of the Constitution of the United States.

But even though the authorities cited above be held not to sustain the conclusions we have predicated upon them, we are, nevertheless, of the opinion that the judgment of the court below must be affirmed. Section 26 of the Farm Loan Act (sections 931-933, 12 U. S. C. A.) quoted supra, is specific in its statement of tax exemptions. It provides that every land bank including the capital and reserve, or surplus therein, and the income derived therefrom, shall be exempt from federal, state, municipal, and local taxation, except taxes upon real estate acquired in satisfaction of debts or purchases at sales under judgments, decrees or mortgages held by it. Farm loan bonds issued by and first mort-

gages executed to the banks and the income derived therefrom are likewise exempted and to the same extent. And the last paragraph of section 26 (12 U. S. C. A. 933) reiterates that nothing in that section shall be construed to exempt the real property of the banks from either state, county, or municipal taxes to the same extent, according to its value, as other real property is taxed.

It seems to us, that when Congress used the word "including" it sought to define exactly what was exempted, and when it used the word "except" and reiterated the exception, it evidenced its intention that, so far as the banks' real estate was concerned, it should be treated with respect to taxation exactly like real estate privately owned. The tax which the appellant challenges is a tax on sales required to be paid by the purchaser. The goods purchased were for use in and upon the real estate of the appellant Bank and not for use otherwise in carrying on the business of the Bank. Congress must have contemplated that the land banks would acquire lands, just as the lands in the instant case were acquired by the appellant, and it must have known that such lands might have buildings and fences upon them that
51 would need conservation and repair. And so the necessity would arise to buy the material needed for these purposes. Yet, it made no mention of taxes of the character here in question.

In view of its particularity with respect to the items that should be exempted from taxation, this silence is significant. The challenged tax is not a charge on the capital or the reserve or the surplus of the bank or the income derived from those items; nor is it a charge against the income derived from the farm loan bonds or the mortgages executed to the bank. It can only remotely affect those items. So it seems to us no implication can be drawn from the wording of the statute that transactions growing out of the use and operation of the lands should be exempted from reasonable and nondiscriminatory charges that private owners of similar lands are required to pay. If implication there may be, it is to the contrary.

"It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the

imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity." Graves v. New York, 306 U. S. 466, 83 L. ed. 927, 59 S. Ct. 595, 120 A. L. R. 1466.

52 The judgment of the District Court is affirmed.

W. L. NUESSLE.
P. G. SWENSON,
District Judge.
G. GRIMSON,
District Judge.
A. G. BURR.

53 In Supreme Court of North Dakota

[File endorsement omitted.]
[Title omitted.]

Dissenting opinion

Filed March 17, 1941

CHRISTIANSON, J. (dissenting). I dissent. The question for decision here is whether sales of personal property within this State to a Federal Land Bank are subject to the State sales tax. The State Sales Tax Act (Ch. 249, Laws 1937) in force during the time involved in this controversy provided:

"SEC. 2. There is hereby imposed * * * a tax of two percent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the State of North Dakota to consumers or users * * *."

"SEC. 3. There are hereby specifically exempted from the provisions of this Act and from computation of the amount of tax imposed by it, the following:

"(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Con-

stitution or laws of the United States or under the Constitution of this State." * * *

"SEC. 4. Taxes paid on gross receipts represented by accounts found to be worthless and actually charged off, for income tax purposes may be credited upon subsequent payment of the tax herein provided; provided, that if such accounts are thereafter collected by the retailer, a tax shall be paid upon the amount so collected. * * *."

* * * * *

"SEC. 6. Retailers shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts. * * *."

54 "SEC. 7. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded."

The defendant Bismarck Lumber Company is engaged in the business of selling building materials as a retailer in Bismarck, North Dakota. During October 1937 the plaintiff Land Bank purchased from said defendant Lumber Company certain building materials for use in repairing, maintaining, and improving the buildings on certain farm properties then owned by the plaintiff Bank in North Dakota—which properties had been acquired by the said Bank in the regular course of its business as a Federal Land Bank. The purchase price of such building materials amounted to some $401.00, exclusive of any State sales tax. The defendant Lumber Company added to such sales price or charge the amount of the State sales tax, namely, two per cent of such sales price, or the sum of $8.02. The plaintiff Bank paid the sales price, but refused to pay the amount of the sales tax that the defendant Lumber Company had added to the sales price, claiming that sales to a Federal Land Bank are exempted from such sales tax and that the defendant Lumber Company was under no obligation to account for, or pay tax on, such sales to the State. The plaintiff Land Bank contended that the imposition of a sales tax upon its purchases are forbidden by Section 26 of the Federal Farm Loan Act, and by the Constitution of the United States, and that consequently the amount of such tax could not

55 be added to the sales price, and that the plaintiff Land

Bank was under no obligation to pay the same. The defendant Lumber Company, on the other hand, contended that the building material so sold by it was subject to such tax, and that consequently it was not only the right but the duty of the Lumber Company to add the amount of such sales tax to the purchase price. Action was brought by the Federal Land Bank against the Lumber Company and the State Tax Commissioner to obtain a determination of the controversy that had thus arisen and for a declaratory judgment adjudicating and determining the rights, liabilities, status, and legal relations of the parties, and for a determination whether the sales in question were subject to the sales tax and whether the Lumber Company might legally add the amount of the sales tax to the sales price and whether the plaintiff Land Bank was under obligation to pay the same. The controversy was submitted to the District Court of Burleigh County for determination and that court held that the sales by the Lumber Company to the plaintiff Land Bank were subject to the State sales tax; that the Lumber Company was required to collect and pay over to the State the sales tax on such sales, and that accordingly it might add the same to the sales price and that the plaintiff Bank was under legal obligation to pay the same. Judgment was entered in favor of the Lumber Company and the State Tax Commissioner and against the plaintiff, the Federal Land Bank of St. Paul, for $8.02, the amount of the sales tax in dispute, and the Federal Land Bank has appealed.

The appellant, the Federal Land Bank of St. Paul, contends:

1. That the imposition of the State sales tax upon the building material purchased by it within this State for the purpose of repairing and maintaining properties which it had acquired in the regular course of its business is forbidden by Section 26 of the Federal Farm Loan Act, 12 U. S. C. A., Para. 931.

56 2. That it is forbidden by implication by the Constitution and laws of the United States, because the Federal Land Bank of St. Paul is an instrumentality of the United States and the tax in question here may in no event be imposed without the express consent of Congress and that Congress has given no consent.

Since all valid congressional enactments are the supreme law of the land and beyond interference by a State, the validity of State taxation of Federal instrumentalities must depend upon (1) the power of Congress to create the instrumentality, and, (2) the intent of Congress as manifested by law to protect it from, or to render it subject to, State taxation.

The Supreme Court of the United States has ruled that Congress acted within its constitutional power, (a) in creating the Federal

Land Banks, and, (b) in exempting farm loan bonds issued by such Banks from Federal, State, municipal and local taxation. Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 41 S. Ct. 243, 64 L. ed. 577. The Court has declared that such Banks "are instrumentalities of the federal government, engaged in the performance of an important governmental function." Federal Land Bank v Priddy, 295 U. S. 229, 231, 55 S. Ct. 705, 706, 79 L. ed. 1408, 1411. See, also, Knox Nat. Farm Loan Assn. v. Phillips, 300 U. S. 194, 81 L. ed. 599. That Court, also, has condemned, as beyond the constitutional power of the state, a statute subjecting mortgages executed to a Federal Land Bank to the payment of a recording tax. Federal Land Bank v. Crosland, 261 U. S. 374, 43 S. Ct. 385, 67 L. ed. 703, 29 A. L. R. 1.

The decisions of the United States Supreme Court are binding upon this Court and definitely establish, (1) that a Federal Land Bank is an instrumentality of the national government,
57 created by Congress, acting within its constitutional powers, to perform authorized governmental functions; and (2) that such Bank is constitutionally endowed with the same immunity from State taxation, that the national government itself would have been endowed with, if it had engaged in such activity directly.

When Congress creates a corporation to carry on some activity that the national government may constitutionally undertake, such corporation may be endowed with the government's immunity from suit (Keifer & Keifer v. Reconstruction Finance Corp. et al., 59 St. Ct. 516, 83 L. ed. 784), and from taxation. Smith v. Kansas City Title & Trust Co.; Graves v. New York ex rel. O'Keefe, 59 St. Ct. 595, 83 L. ed. 927, 120 A. L. R. 1466; Pittman v. Home Owners' Loan Corp., 308 U. S. 21, 84 L. ed. 11; 124 A. L. R. 1263; Roberts v. Federal Land Bank of New Orleans, — Miss. —, 196 So. 763; Federal Land Bank of Spokane v. Statelen, et al., 191 Wash. 155, 70 Pac. 2d. 1053; McGovern, et al., v. Federal Land Bank of St. Paul, — Minn. —, — N. W. —. Whether such immunity exists, and if so the extent thereof, are questions of congressional intention. Federal Land Bank v. Priddy, supra; Smith v. Kansas City Title & Trust Co., supra; Federal Land Bank of St. Paul v. DeRochford, 69 N. D. 382, 287 N. W. 522.

The plaintiff, Federal Land Bank, was established under authority of the Federal Farm Loan Act of July 17, 1916. 39 Stat. at L. 360, Ch. 245, 12 U. S. C. A., Sec. 641 et seq.

That Act provides:

"That every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held,

purchased, or taken by said bank or association under the provisions of section eleven and section thirteen of this Act. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation." 39 Stat. at L. 380, Ch. 245, Sec. 26 (12 U. S. C. A. Sec. 931.).

58 The State sales tax is not a tax imposed upon the retailer for the privilege of engaging in business or for the privilege of making the sale. The law lays the burden of the tax upon the purchaser. Jewel Tea Co. v. State Tax Commissioner, 70 N. D. —, 293 N. W. 386. It places upon the retailer the duty to collect the tax from the purchaser, and to account for and pay the tax collected over to the State Tax Commissioner (Monamoter Oil Co. v. Johnson, 292 U. S. 86, 93, 78 L. ed. 1141, 1147), but the law does not contemplate that the retailer shall pay the tax. On the contrary, he is forbidden to assume the tax or to hold out to the purchaser that the tax "will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded." Sales Tax Act, Section 7.

"The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. Only in event that the seller fails to pay over * * * the tax collected or to charge and collect it as the statute requires, is the burden cast on him." (McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 43, 84 L. ed. 565, 568, 569.)

The State sales tax is an enforced contribution exacted by the State in the exercise of its taxing power to provide for the support of the government. 61 C. J. pp. 68, 69. It is a substantial, direct and discernible tax imposed upon the purchaser of personal property, which the seller is required to collect from the purchaser and pay over to the State Tax Commissioner. If the sales which gave rise to this controversy are subject to the

59 State sales tax, a tax of two percent of the sales price, or $8.02 must be paid by the plaintiff Federal Land Bank. In the Act providing for the establishment of Federal Land Banks, Congress said:

"Every Federal Land bank * * *, including the capital and reserve or surplus therein or the income derived therefrom, shall be exempt from * * * State taxation, except taxes upon real estate held, purchased or taken by said Bank under the provisions of Section eleven and Section thirteen of this Act."

it is difficult to see that this language evidences any intention on the part of Congress to render a Federal Land Bank subject to a State tax on purchases made by such Bank in carrying on the activities that such Bank was created to perform. It seems to evidence quite a contrary intention.

"Taxation" is the act of laying a tax. It is the process or means by which the taxing power is exercised. 27 Am. & Eng. Ency. L., 2d ed., p. 581; 1 Cooley on Taxation, 4th ed. p. 72, Sec. 7; 61 C. J. 66; 24 Cal. Juris, pp. 20, 21. Taxation is a comprehensive term; it is not restricted to taxes on property, but "covers every conceivable exaction which it is possible for a government to make" in the exercise of its taxing power. Hylton v. United States, 3 Dall. 171, 1 L. ed. 556; Webster's New Int. Dictionary.

This is not a case where Congress has been silent. It has spoken clearly and emphatically. It has said: "Every Federal Land bank * * * including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank * * * under the provisions of" the Federal Farm Loan Act. Congress used the comprehensive term *taxation*. This includes every form of tax—every exaction that might be made for State, municipal or
60 local purposes by exercise of the taxing power. Congress considered not only the question whether a Federal Land Bank should be subject to or immune from the taxing power of the State, but whether any of its assets should be subject to such power; and it declared that every Federal Land Bank, including the capital and reserve or surplus therein or the income derived therefrom, shall be exempt from State taxation, and then declared further that the only exception to the immunity from State taxation should be "taxes upon real estate held, purchased, or taken by said bank under the provisions of section eleven and section thirteen" of the Federal Farm Loan Act. The plain and natural meaning of what Congress said is that the State taxing power shall not extend to a Federal Land Bank, or to any of its rights or assets, with the single exception of such real estate as the Bank may hold or have acquired under the provisions of sections 11 and 13 of the Federal Farm Loan Act.

The imposition of the State sales tax is State taxation. It is not a tax upon any of the real estate held by the Bank. It is a tax laid directly upon the Bank as a purchaser within this State (309 U. S. 49, 84 L. ed. 572) of certain building material to be utilized by it in repairing structures on lands that it has acquired upon the foreclosure of mortgages it has taken in the regular course of its business. If the State may impose a tax upon a Federal Land Bank because it purchases certain personal prop-

erty required in the conduct of its work in this State, the State may, also, impose a "use" tax if the Bank purchases such property without the State, and thereafter brings the property into this State and uses it here. Henneford v. Siles Mason Co., 300 U. S. 577, 81 L. ed. 814.

In the case of Federal Land Bank v. Crosland, 261 U. S. 374, 67 L. ed. 703, the Supreme Court of the United States held
61 that a tax imposed by the State of Alabama as a condition for the recording of a mortgage might not be imposed on a Federal Land Bank and that the imposition of such tax was forbidden by the Federal Farm Loan Act. The Supreme Court of Alabama sustained the tax on the ground that the amount of the recording tax was optional and that the Federal Land Bank was not required to put its mortgage on record and that if it did not record it, no tax was imposed, but that if it desired to have the mortgage recorded it must pay what others were required to pay for the registration of its security. The Supreme Court of the United States held this reasoning to be unsound, and pointed out that the laws of Alabama made it practically necessary to record real estate mortgages because unless recorded a mortgage would be of no effect as to a purchaser without notice, and that consequently the effect of the law was to impose the tax upon the mortgages of the Federal Land Bank and compel the Bank to pay such tax and that this was forbidden by the provisions of the Federal Farm Loan Act. The decision in the case of Federal Land Bank v. Crosland was adhered to and followed by the Supreme Court of the United States in its decision in Pittman v. Home Owners' Loan Corporation, supra. That case involved a tax imposed by the State of Maryland upon mortgages recorded or offered for record. The question arose whether mortgages taken by the Home Owners' Loan Corporation were subject to the tax. The Court held that the imposition of the tax was forbidden by the provisions of the Home Owners' Loan Act that "the Corporation, including its franchise, its capital, reserves, and surplus, and its loans and income" shall be exempt "from all taxation" imposed by "any state, county, municipality, or local taxing authority," except that "any real property
62 of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed." In the decision in the Pittman case, the Court said:

"Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. 'A power to create implies a power to preserve.' McCulloch v. Maryland, 4 Wheat. 316, 421, 422, 4 L. ed. 579, 605. This power to preserve necessarily comes within the range of the express

power conferred upon Congress to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. I, Sec. 8, par. 18. In the exercise of this power to protect the lawful activities of its agencies, Congress has the dominant authority which necessarily inheres in its action within the national field. The Shreveport Case, 234 U. S. 342, 351, 352. The exercise of this protective power in relation to state taxation has many illustrations. See, e. g., Bank v. Supervisors, 7 Wall. 26, 31; Choate v. Trapp, 224 U. S. 665, 668, 669; Smith v. Kansas City Title & Trust Co., 255 U. S. 207; Trotter v. Tennessee, 290 U. S. 354, 356; Lawrence v. Shaw, 300 U. S. 245, 249. In this instance, Congress has undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity. As we have said, we construe this provision as embracing and prohibiting the tax in question. Since Congress had the constitutional authority to enact this provision, it is binding upon this Court as the supreme law of the land. Const. Art. VI." 308 U. S., pp. 32–33.

The tax involved in this case is nondiscriminatory. It applies to all sales of goods, wares, or merchandise sold at retail in this State to consumers or users, except to the sales of tangible personal property which the State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of the State. But the taxes involved in the Crosland and Pittman cases were, also, nondiscriminatory. The
63 taxes involved there were laid generally upon the recording of all real estate mortgages. The tax involved here is a direct tax of two percent, upon the entire purchase price, to be paid by the purchaser. If sales within this State to a Federal Land Bank of tangible personal property which the Bank is required to purchase in carrying on the functions which Congress intended it should carry on within this State are subject to the sales tax, then the Federal Land Bank is required to pay a tax of two percent on all such purchases made by it. In the instant case the tax so imposed would amount to $8.02—the amount of the judgment rendered against the plaintiff Land Bank. As I construe the Federal Farm Loan Act, and the decisions of the Supreme Court of the United States interpreting and construing the same and analogous acts, the State is inhibited from laying this tax upon a Federal Land Bank, and the judgment against the plaintiff Bank should be reversed.

A. M. CHRISTIANSON.

64 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1941

Supreme Court of the United States

Order allowing certiorari

Filed May 12, 1941

The petition herein for a writ of certiorari to the Court of Court of the State of North Dakota is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1941